

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JENNIFER TABOR)	
Claimant)	
)	
VS.)	
)	
LA PETITE ACADEMY)	
Respondent)	Docket No. 1,067,343
)	
AND)	
)	
ACE AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the April 29, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) John Clark. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Clifford Stubbs, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

The record on appeal is the same as that considered by the ALJ and consists of the February 25, 2014 preliminary hearing transcript, with exhibits; the April 29, 2014 preliminary hearing transcript, with exhibits; and all pleadings contained in the administrative file.

ISSUES

Claimant requests review of whether her work-related accident was the prevailing factor causing her injury, medical condition, and resulting disability or impairment.

Respondent argues the ALJ's Order should be affirmed.

The ALJ denied claimant's request for medical treatment of her neck and low back, stating:

Dr. David Hufford performed a court ordered medical examination. Dr. Hufford reviewed medical records from July 6, 2013, and August 13, 2013, with a previous low back pain treatment for a decade, and he states:

"For this reason, the work-related fall that occurred on August 29, 2013, cannot be considered the prevailing factor for her current symptomology. . . .This injury

appears to be an aggravation of a pre-existing condition, and there is ample evidence in the record that her symptoms of a similar nature were present before this incident occurred."

The work-related accident of August 29, 2013, is not the prevailing factor for the Claimant's present problems.¹

The sole issue for Board review is: was claimant's accident the prevailing factor causing the injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was hired as a lead teacher by respondent on August 6, 2012. She described her August 29, 2013 accident as follows:

I was picking up the cots that the kids sleep on and there was a kid behind me who put his leg out and made me trip and fall backwards, and so I hit my back and like jarred my neck when I fell backwards.²

Two preliminary hearings were held in this matter, one on February 25, 2014 and another on April 29, 2014. Following the first preliminary hearing, ALJ Clark ordered that claimant undergo an independent medical evaluation by Dr. David Hufford.

At the February 25, 2014 preliminary hearing, claimant testified that after her work accident she had sharp right leg, neck and low back pain, and could not bend over or sit for a very long time. She reported the fall to respondent a couple days later and saw Dr. Romeo Smith twice, on September 11 and 18, 2013. He diagnosed claimant with an acute neck sprain and lumbar strain. Dr. Smith ordered x-rays of claimant's cervical and lumbar spine. The cervical x-rays revealed no abnormalities, while the lumbar x-rays showed decreased disc height at L4-5 and probable chronic Schmorl's nodes in the superior endplates of L1, L2 and L3.

Claimant testified she had her back aligned by a chiropractor two or three years before this accident. However, prior to the August 29, 2013 accident, she had never seen a medical doctor for her neck. Claimant acknowledged she was involved in a couple of automobile accidents and had sought treatment for her neck and back from her

¹ ALJ Order (Apr. 29, 2014).

² P.H. Trans. (Feb. 25, 2014) at 7.

chiropractor in 2000 and 2006. Claimant also testified she saw her chiropractor, Kassie Gannaway-Zwiener, as recently as July 6, 2013, for low back pain.

Dr. Gannaway-Zweiner treated claimant from December 23, 2003, through July 6, 2013. The records from December 23, 2003, through March 9, 2006, indicate claimant complained of only lower and upper back pain. The chiropractic records state claimant had an automobile accident on October 7, 2006, and there was no major impact on her car. The chiropractor's notes are difficult to decipher, but they appear to note claimant had a decrease in range of motion in all areas with discomfort, but not extreme pain. A diagram of a human body is marked at the level of the cervical spine. The records do not make a specific reference to treatment of claimant's cervical spine or neck.

In a letter dated August 13, 2013, addressed to whom it may concern, Dr. Gannaway-Zweiner indicated claimant experienced an exacerbation of her low back symptoms, which concurred with the chiropractor's diagnosis of a disk bulge/herniation with sciatica. The letter does not mention a cervical spine or neck injury.

Claimant testified she sought treatment for her back at the Guadalupe Center on August 13, 2014. Notes from Guadalupe Center, however, indicate claimant first sought treatment on July 31, 2013, for her back. Claimant reported pain going into her right leg, was diagnosed with lumbar spine pain and was prescribed Naproxen. August 13, 2013, Guadalupe Center notes indicated claimant reported a slipped disc, was going to a chiropractor and two months earlier her pain worsened. Claimant was diagnosed with lumbar disc disease.

At the April 29, 2014 preliminary hearing, claimant testified that before the August 29, 2013 fall, she was able to do normal things such as doing laundry, going up and down stairs, brushing her hair and showering correctly. Now her leg was numb all the time and it was hard to do her everyday activities. She even cut her hair off to make it easier to wash. Claimant testified that prior to her work accident, "I really didn't have any back problems. I would like, my back would hurt every once in a while, I would go to the chiropractor, she would put me on the machine, and then I was fine."³ Claimant testified that now she has constant leg pain, although she acknowledged having occasional right-leg pain before her fall. She also indicated that prior to August 29, 2013, her back pain had calmed down, but "after I fell, then it all started flaring up again."⁴

When asked what problems she was having with her neck, claimant testified: "I have constant headaches. They don't ever go away. I even feel the tension and stuff in

³ P.H. Trans (Apr. 29, 2014) at 8.

⁴ *Id.* at 9.

my shoulders and up in my neck, and it's hard for me like to turn a certain way"⁵

At respondent's request, claimant was examined by Dr. John P. Estivo on October 10, 2013. Cervical spine x-rays ordered by the doctor revealed no fractures, no subluxation, no dislocation and no destructive lesions. X-rays of the lumbar spine were essentially normal with the exception of some degenerative changes. His impressions were cervical spine pain, lumbar spine pain, preexisting chronic lumbar spine pain and a preexisting history of previous cervical and lumbar spine injuries. Dr. Estivo recommended he be provided claimant's prior medical records for review and she undergo cervical and lumbar spine MRIs.

After reviewing claimant's medical records and cervical and lumbar spine MRIs conducted, Dr. Estivo again saw claimant on October 24, 2013. The doctor diagnosed claimant with mild nonspecific reversal of the normal cervical lordosis centered at about C5-6 of uncertain significance or etiology. He indicated this was commonly related to positioning of the MRI. With regard to claimant's cervical spine, Dr. Estivo noted:

She admits that she has had chronic cervical spine pain on and off for several years related to an automobile accident that occurred in 2006. When I saw her on 10/10/2013 she did tell me that she experienced a whiplash injury related to a motor vehicle accident and that she continued to see the chiropractor every two years for adjustments. She told me that she primarily had lower back pain, but did occasionally have cervical spine pain as well. There are no objective abnormalities found with her cervical spine today.⁶

Dr. Estivo noted that a lumbar spine MRI revealed degenerative disc disease at L4-5, with a herniated disc at L4-5 toward the right causing moderate to severe right lateral encroachment. He indicated claimant had degenerative changes throughout the lumbar spine. Dr. Estivo's report stated claimant had chiropractic treatment in 2003, 2004, 2005, 2006, 2011 and 2013. Regarding claimant's chiropractic treatment, Dr. Estivo stated:

There is a letter from Dr. Gannaway-Zweiner from North Rock Chiropractic and Wellness. The letter states that the patient had been a patient of Dr. Gannaway-Zweiner for several years. Most recently she was seen on 07/06/2013. It states that she had not been seen for two years, but on her last visit she was experiencing terrible lumbar spine pain. It states that upon treatment there was progress made, but it lasted a very short time and never completely relieved the patient of her pain. It states that the patient experienced an exacerbation of her symptoms, which occurred with the chiropractor's diagnosis of a disk bulge/herniation with sciatica.

⁵ *Id.* at 10.

⁶ P.H. Trans. (Feb.25, 2014), Resp. Ex. 1 at 3.

The chiropractor stated that she referred the patient then on to a primary care physician for follow up and subsequent MRI.⁷

Dr. Estivo opined the prevailing factor regarding claimant's cervical and lumbar spine complaints was her preexisting conditions.

Claimant was evaluated by Dr. Pedro Murati on December 16, 2013, at the request of her counsel. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Claimant gave a history of being in an automobile accident 2-4 years earlier and had pain in her low back, and denied any other preexisting injuries to her low back and neck prior to her August 2013 work accident. Dr. Murati diagnosed claimant with the following: (1) myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; (2) low back pain with signs of radiculopathy; and (3) morbid obesity. The doctor recommended additional medical treatment such as physical therapy, cortisone trigger point injections, anti-inflammatory medications, pain medications, bilateral lower extremity NCS/EMG including the lumbar paraspinals and a series of lumbar epidural steroid injections as well as a surgical evaluation if needed.

Dr. Murati opined:

The claimant sustained a work related accident and multiple repetitive traumas at work which resulted in neck, upper back and low back pain. . . . There is a letter written by her chiropractor indicating the last visit prior to her new complaints from the work accident was preceded by two years. This is a clear indication to this examiner that her previous low back complaints were in the worst case scenario stable and in no need for concurrent treatment until the work comp accident. . . . Regarding the neck,; again, there is no documentation of ongoing treatment for two years preceding this work accident and no evidence of degeneration in her cervical spine. She has significant clinical findings that have given her diagnoses consistent with her described accident and repetitive traumas at work. Apparently, on this claimant's dates of injury she sustained enough permanent structural change in the anatomy of her neck upper back and low back which caused pain necessitating treatment. . . . Without this work related accident and multiple repetitive traumas, I have no reason to believe that she would be experiencing the symptoms and demonstrating the findings that have given her the diagnoses above. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the accident and multiple repetitive traumas at work.⁸

⁷ *Id.*, Resp. Ex. 1 at 2.

⁸ *Id.*, Cl. Ex. 2 at 5-6.

Pursuant to the court ordered independent medical evaluation, Dr. Hufford examined claimant on April 15, 2014. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Hufford's report indicated claimant sustained low-back injury as the result of a 2000 automobile accident, but not a cervical spine injury. The doctor's report indicated claimant reported mild residual pain in the neck and frequent headaches. Dr. Hufford diagnosed claimant with low back pain with L4-5 right eccentric disc herniation and myofascial neck pain. He indicated there did not appear to be any acute tissue injury to the cervical discs or other structures. The doctor opined:

-The diagnosis for her residual neck pain is myofascial neck pain. There does not appear to have been an acute tissue injury to the cervical discs or other structures. In the lumbar spine she has low back pain with right leg radicular symptoms and an L4-5 right eccentric herniated disc which is consistent with her symptomatology.

-It is clear from the review of records that Ms. Tabor has pre-existing low back pain of an ongoing nature and that this low back pain preceded her work injury of August 29, 2013. There is documentation in the medical records for treatment at the Guadalupe Clinic on July 31, 2013 and August 13, 2013 with low back pain which includes significant right leg radicular component. There is documentation in the medical record from Northrock Chiropractic Clinic for ongoing episodic treatment of low back pain for over a decade prior to the work injury in question. On August 13, 2013 is a letter from chiropractor Dr. Kassie Gannaway-Zweiner advising Ms. Tabor to avoid travel due to a suspected lumbar disc herniation and this letter preceded her work injury. Also in the record is a 15 lb. work restriction provided on July 6, 2013 due to her low back pain. For this reason the work-related fall that occurred on August 29, 2013 can not be considered the prevailing factor for her current symptomatology. The only way to prove that the work-related fall contributed to the disc herniation would have been the presence of an MRI study prior to the injury of August 29, 2013. This injury appears to be an aggravation of a pre-existing condition and there is ample evidence in the record that her symptoms of a similar nature were present before this incident occurred.⁹

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) provides:

⁹ Dr. Hufford's IME Report filed April 18, 2014.

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp 44-508(f)(2) provides:

An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2013 Supp. 44-508(d) provides:

'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(g) states:

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant asserts she injured her neck, back and right leg as a result of her work accident. The evidence shows claimant has symptoms of right leg radiculopathy precipitated by her lumbar spine condition. The first issue to be determined is whether claimant's accident on August 29, 2013, was the prevailing factor causing her lumbar spine injury and resulting right-leg radiculopathy and need for medical treatment.

This Board Member finds claimant failed to prove her August 29, 2013 accident was the prevailing factor causing her lumbar spine injury and right-leg radiculopathy and need for medical treatment for said injury. Prior to her work accident, claimant had a lengthy history of low-back symptoms. From 2003 through August 13, 2013, claimant received chiropractic and medical treatment for her low back. On July 6, 2013, less than two months prior to her work accident, claimant's chiropractor diagnosed claimant with a bulging disc. Drs. Hufford and Estivo opined claimant had a preexisting lumbar-spine injury and her work accident was not the prevailing factor causing her lumbar spine injury and need for medical treatment. Claimant's statements to those physicians and her testimony confirms those opinions. In particular claimant's testimony that her accident caused her

back condition to start “flaring up again,” supports a finding claimant had a preexisting lumbar spine condition.

In his preliminary hearing Order, the ALJ quoted Dr. Hufford’s report with regard to claimant’s low-back injury and denied claimant’s request for benefits. The ALJ stated claimant’s accident was not the prevailing factor causing her present problems, which presumably included her low back and cervical injuries. Therefore, the second issue for determination is whether claimant’s accident on August 29, 2013, is the prevailing factor causing her cervical spine injury and need for medical treatment.

Claimant testified she had no problems with her neck prior to her work accident. She testified she saw her chiropractor for neck and back pain after 2000 and 2006 auto accidents. The chiropractic records in evidence indicate claimant had an automobile accident in October 2006, but make no specific reference about treatment of claimant’s cervical spine.

Dr. Estivo indicated claimant’s cervical spine MRI showed no abnormalities, but also opined her cervical spine condition preexisted her work accident. Dr. Murati opined claimant’s work accident was the prevailing factor causing her cervical spine injury and need for medical treatment. Dr. Hufford was silent on whether claimant had a preexisting cervical condition.

Claimant has made inconsistent statements regarding her preexisting cervical spine condition. Dr. Estivo indicated claimant admitted having chronic cervical spine pain, on and off, for several years related to an automobile accident that occurred in 2006. Dr. Hufford indicated claimant reported sustaining only a low-back injury as the result of a 2000 automobile accident. Dr. Murati’s report indicated claimant injured her low back in an auto accident 2-4 years prior to her work accident, but denied having a preexisting neck condition, but noted she had myofascial neck pain.

From the record, this Board Member finds little evidence claimant had a preexisting cervical spine condition. Claimant testified she received some chiropractic treatment of her cervical spine following her 2000 and/or 2006 automobile accidents. There are no specific references to treatment of the cervical spine or neck in the chiropractic records after October 2006. Nor did claimant ever receive medical treatment for cervical spine/neck symptoms. The cervical MRI ordered by Dr. Estivo revealed no degenerative disc disease or other preexisting cervical spine condition. Dr. Estivo’s opinion appears to be largely based upon claimant’s alleged statement to the doctor of having chronic cervical spine pain since her auto accidents. It is unusual that claimant would report having chronic cervical spine pain since her auto accidents to respondent’s expert, Dr. Estivo, but deny the same to Drs. Murati and Hufford. It is also significant that Dr. Gannaway-Zwiener’s August 13, 2013 letter, indicated she saw claimant on July 6, 2013, for low-back pain, but did not mention claimant’s cervical spine/neck.

This Board Member finds claimant by the narrowest of margins proved she sustained a neck injury by accident arising out of and in the course of her employment with respondent, as her accident was the prevailing factor causing her neck injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member finds that the April 29, 2014, preliminary hearing Order entered by ALJ John Clark is modified by finding claimant sustained a neck injury by accident arising out of and in the course of her employment with respondent. This matter is remanded to the ALJ to issue appropriate orders consistent with the findings herein. The ALJ is specifically instructed to determine what, if any, medical treatment is necessary to treat claimant's neck injury. The Board affirms the ALJ's finding that claimant's work accident was not the prevailing factor for her low back injury. The Board adopts the remaining findings set forth in the Order to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

HONORABLE THOMAS A. ARNHOLD
BOARD MEMBER

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Honorable John Clark, Administrative Law Judge

¹⁰ K.S.A. 44-534a.

¹¹ K.S.A. 2013 Supp. 44-555c(j).